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JOSEPH F. SPANIOLO, JR.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

KENNETH C. GRIMES  
PETITIONER

VERSUS

LOUISVILLE AND NASHVILLE R. CO.  
RESPONDENT

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES SUPREME COURT  
FROM THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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Date:  
12/04/89

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40 pgs



QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in affirming the District Court's judgment, that dismissed a motion to confirm an arbitration award on grounds of res judicata as a court of equity, when the operative facts in both suits were unrelated?

II. Whether the Court of Appeals erred in affirming the District Court's judgment that dismissed a motion to confirm an arbitration award, when the judgment was grounded in unwarranted, jurisdictionally defective equity that violated the Petitioner's constitutional rights under Article III § 2 and the Seventh Amendment?

PARTIES TO JUDGMENT ON REVIEW

Kenneth C. Grimes v. Louisville & Nashville Railroad Company. 583 F. Supp 642 (1989).



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VII

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

KENNETH C. GRIMES  
PETITIONER

VERSUS

LOUISVILLE AND NASHVILLE R. CO.  
RESPONDENT

ON WRIT OF CERTIORARI FROM  
THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

Kenneth C. Grimes, as pro se petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, which affirmed the decision of the District Court for the Southern District of Indiana denying Petitioner's motion to confirm a National Railroad Adjustment Board award for damages. The Court under erroneous equity jurisdiction dismissed the award upon the Defendant's claim of res judicata when the operative facts were unrelated as a court of equity.





## VIII

### OPINIONS BELOW

The Seventh Circuit Court of Appeals's decision affirming the District Court's denial of Petitioner's motion to affirm the arbitration award is an unpublished order as not to be cited per Circuit Rule 53, under Appeals Court Cause No. 88-1381.

### JURISDICTION

The three-judge-panel decision of the United States Court of Appeals for the Seventh Circuit is dated January 27, 1989. Petitioner filed a petition for panel rehearing on February 9, 1989. The petition for a panel rehearing was denied on September 6, 1989. The petition is timely having been filed within the ninety (90) days of this subsequent judgment. Jurisdiction is present under 28 USC §§ 1254, 1291.



### CONSTITUTIONAL PROVISIONS IMPLICATED

The provisions implicated in Petitioner's case, which is reprinted as verbatim in Appendix U, V is Article III §2 and the Seventh Amendment.

### STATEMENT OF THE CASE

On July 9, 1979, the L & N Railroad Co. reinstated this petitioner (Grimes) to a position that impaired his seniority rights. This action was contrary to the National Railroad Adjustment Board decision. (R. 58,59). Following the breach, Grimes sought reinterpretation of the award. On March 30, 1981, the L & N abolished Grimes's job and furloughed him making impaired seniority worse and reducing the remedy under the agreement between L & N and the International Brotherhood of Electrical Workers as Rule 34 to compensatory damages. (R. 178,179,188)

On June 11, 1981, Grimes filed this suit in District Court, where the



practical effect from the action, concerning abolished job and furlough caused the suit to be one in damages.

( R. 204)        The suit demanded a trial by jury as to those issues triable by jury. ( R. 206)

Following demands to strike the jury demand claim of Grimes by the defendants, L & N and the IBEW, Grimes reinstated his demand for a jury trial. (R. 208)

Following a hearing on the defendants' motions for summary judgment dated July 9, 1982. The District Court in error concluded that the defendants entered motions to strike the jury demand, but in fact, there was no valid motion to strike the jury demand. (208, 209, 211, 212)

This was the basis in which the District Court acquired and maintained defective equity jurisdiction. Moreover, the trial held July 9, 1982, was non-jury



trial mode. On a hearing based on defective equity jurisdiction, the District Court entered a final judgment on February 10, 1984. The decision in a separate opinion concluded that the L & N impaired Grimes's seniority rights but was silent on damages. (R. 58,91,92) The decision also disposed of the remaining issues except a retaliation claim that were incidental to damages.

Following an interlocutory appeal, trial on the retaliation claim and appeal to the Seventh Circuit Court of Appeals and to this Court Grimes returned to the District Court and on June 11, 1987, timely entered his motion to confirm the award. Thereafter the defendant, L & N, as the sole defendant, entered a motion to dismiss on the basis that the February 10, 1984 decision was final and res judicata to Grimes's motion to confirm as an independent suit. Grimes argued that





the proceeding was not separate and that the law was adequate for relief. (R.160) On September 15, 1987, the District Court entered a judgment that accepted the defendant's claim of res judicata in a non-jury trial mode extended from the July 9, 1982 defectively acquired equity jurisdiction. The Court dismissed Grimes's motion to confirm the award and was silent on equity and damages. ( R.21 ) The Court of Appeals affirmed the District Court's decision on res judicata and was silent on equity, a controlling question sought on this appeal. (R.11 .)

The sole issue sought in complaint is damages. The District Court passed on the issue as a court of equity. The Court of Appeals adopted the decision of the District Court, leaving the issue of damages still open, where the simple ministerial act of Grimes being allowed



to amend and update his damages and the court entering a judgment confirming the award for those damages is all that is left.

REASON WHY THE PETITION SHOULD ISSUE

The Court should grant the petition to settle the question as to whether the Court of Appeals, affirmation of the District Court's decision to dismiss a motion to confirm a National Railroad Adjustment Board award is objectively reasonable as an application in equity of the doctrine of res judicata by the L & N.

The arguments put forth by the L & N at District and Appeals Courts are essentially the same.

The argument by the L & N at District Court states:

"the doctrine of res judicata bars Grimes from asserting in this action or in any separate action that the award of the NRAB of June 13, 1979, is not



subject to judicial enforcement  
against the L & N." (P. 4  
Motion to Dismiss 7/2/87)

The District Court extended the argument relying on Gasbara v. Park-Ohio Industries, Inc., 655 F. 2d 119, 121 (7th Cir. 1987), Diaz v. Indian Head, Inc., 686 F.2d 558, 562 7th Cir. 1982). See also IB Moore's Federal Practices ¶ 0.405 (1984) and see Lee v. City Peoria, 685 F.2d. 196 (7th Cir. 1982).

These cases and the same theory were relied upon by the District Court (see R.20 ) and the Court of Appeals ( R.7 ).

In all three arguments, the support for res judicata is based upon an argument that the operative facts are the same in both the proceeding before the award and in the lawsuit that followed in District Court, so therefore, the motion to dismiss confirmation of the NRAB award is effected by the doctrine of res judicata.



The Appellant (Grimes) argues that the facts supporting the res judicata theory herein are not the same and that the proceeding to confirm the award is not a separate proceeding. It is held in Dalow Industries, Inc. v. Jordache Enterprises, Inc., 631 F. Supp. 779 (S.D. N.Y. 1986), "The most important factor in answering this question is the factual predicate of the several claims asserted. For it is the facts surrounding the transaction or occurrence which operate to constitute the case of action, not the legal theory upon which a litigant relies." (Expert Electric, Inc., et al v. Levine, (2d Cir.) 554 F.2d 1227, 1234, cert denied (1977), 434 U. S. 903, 98 S. Ct. 300, 54 L.Ed. 2d 190, Rullo v. Rodriguez, (S.D. N.Y. 1985) 604 F Supp 366, 369.)

What are the operative facts that do not support the theory of res judicata in





this case?

The facts are as follows:

(A) In the proceedings before the NRAB, the Appellant sought a claim for reinstatement with his seniority rights unimpaired and back pay from a wrongful discharge. ( R. 93,94 )

(B) Also, the Appellant was an employee of the L & N. ( R.94)

(C) The remedy under Rule 34 of the agreement was available. (R.187,188)

The relief sought in District Court was based on the following facts:

(1) The complaint was filed in a Federal Court with diversity jurisdiction. (R.182)

(2) The remedy under Rule 34 of the agreement made damages the only relief available in complaint. (R.187,188)

(3) The Appellant's complaint demanded trial by jury. (R.206)

(4) The Appellant (Grimes) was no



longer an employee of the L & N before the suit was filed in District Court. (R.178,179)

(5) The issues raised in complaint that are incidental to damages were not issued before the NRAB. (R.91-94)

(6) The issue of seniority rights impairment only determined the Appellee's (L & N) liability. (See Steffen v. Farmers Elevator Service Co., 109 F Supp. 16, p. 20.)

(7) The motion to confirm the award was timely filed. (See Indiana Code 34-4-2-2 at [21].)

(8) The Appellant (Grimes) sought back pay in his complaint for excessive penalty. Whereas, in the NRAB proceeding back pay was sought for wrongful discharge. (R. 203,204,93,94)

The facts associated with the NRAB proceeding are unrelated to those pursued in complaint. Appellant (Grimes)



"complaint while still an employee involved matters in a different time frame" than those made in his complaint. (Robert E. Fingar v. Seaboard Coast Line R. Co., 606 F.2d 648 (1979)).

The claims asserted by Grimes in the complaint of this proceeding "were distinct in time from those asserted in the first and could not have been raised in the first administrative action. Accordingly the present action should not be barred by the first." (Ibid Fingar v. Seaboard.) Moreover, the motivation of Grimes in his complaint was to confirm the award for a judgment exclusively in damages. (Conn-Zarchen v. Union Equipment Co., 121 A. 2d 287, 20 Conn Sup 44.) holds: "The complaint as an initial step is to seek affirmation of the award." (Ibid Zarchen v. Union.) Awards are not confirmed by the NRAB. The claims put before the NRAB would not make



a convenient trial unit. (Restatement [second] of judgments (1982) section 24). "The Railway Labor Act, 45 USCS §151 et seq., does not give right to railroad employees to sue in Federal Court for wrongful discharge." (Stack v. New York C. R. Co., (1958 CA 2 NY) 258 F.2d 739, 35 CCCHLC ¶ 7195) and that "claims for wrongful discharge under railroad collective bargaining agreements are subject to resolution only by compulsory administrative procedures provided by collective agreement and by Railway Labor Act." (Mermuk v. Baker, (1973, E. D. Pa) 366 F Supp 735.) Thus Grimes, the Appellant herein, as well as other "employees who were not discharged could not defeat the exclusive jurisdiction of the National Railroad Adjustment Board merely by bringing action as a common-law suit for wrongful discharge. (Buchanan v. St. Louis S. R.





Co., (1966, Tex Civ. App. 5th Dist.) 400, SW 2d 362, writ ref nre.) Further, as a trial unit, it would not be convenient on the grounds that the parties in a proceeding before the NRAB do not expect trial by jury mode. The Appellant demanded a jury trial in his complaint under diversity jurisdiction. ( R. 206).

Moreover, the L & N abolished the Appellant's job and furloughed him before the suit was filed June 11, 1981. The earlier suit sought reinstatement. In this proceeding there is no remedy for reinstatement due to the abolished job. The Appellant cannot be reinstated to something that does not exist. Nor was the Appellant (Grimes) an employee when the complaint was filed.

The L & N and Grimes do not expect reinstatement to be a factor to be considered on the complaint, only damages



on the grounds that (1) the L & N did abolish the job and along with that part of the remedy under Rule 34 of the agreement, and (2) Grimes believes the suit for damages exclusively is adequate and that there is adequate law to accomplish confirmation of the award as a judgment for damages.

The Court of Appeals judgment is in error in its claim that Grimes could have raised his motion to confirm earlier but didn't. The agreement follows the Railway Labor Act. The Act under § 153 Second provides that procedure is to be followed under Federal Rules of Civil procedure. Rule 69(a) and 9 USCS §9 provide that upon scarcity of point in Federal cases, state law may be followed. Indiana Code pursuant to IC 34-4-2-21 adopts other law in states with uniform arbitration statutes. Thus, the motion to confirm was timely and appropriate.



(9 USCS § 9 Derwin v. General Dynamics Corps., (1983 CA Mass) 719 F.2d 484, 114 BNA LRRM 3076, 99 CCHLC ¶ 10507). The Indiana statute allows for six year period after defendant's answer. (Har-Mar, Inc. v. Thorsen & Thorsen, Inc., 1974, 218 NW 2d 751, 300 Minn 149.) Also, following the same point as made in other state law. It has been held that "confirmation of an arbitration award is not a separate proceeding." (See Lesser Towers, Inc. v. Roscoe-Ajax Construction Co., 258 F. Supp. 1005 (1966) at (1) and that in "the complaint the initial step is to seek affirmation of the award." (Conn-Zarchen v. Union Equipment Co., 121 A 2d 287, 20 Conn Sup 44.)

The Appeals Court's judgment refers to a cause of action as having the same operative factors. The Court makes no distinction between a cause of action based on the substantive law of legal



liability as opposed to the right to pursue a judicial remedy as a right to enforce a cause of action by suit, they are not "synonymous" with a cause of action. (Thorgaard Plumbing & Heating Co. v. County of King Wash), 426 P. 2d 828.)

The Court of Appeals should not have affirmed the District Court's decision on grounds of res judicata, the so called two suits used by the Defendant L & N are unrelated as to the case operative facts.

Reasons why the Court of Appeals judgment is in error for affirming a District Court judgment in a dismissal of a motion to confirm as an unwarranted proceeding in equity, which violated Article III § 2 and the Seventh Amendment of the Constitution.

The abolishment of Grimes's job and the subsequent furlough on March 30, 1981, eliminated all of the remedy under





Rule 34 of the agreement except that part that reads "and compensated for the wage loss if any resulting from said suspensions or dismissal."

This action made the major relief sought in complaint filed June 11, 1981, an action for damages. No other relief could be had except that which was left under Rule 34 of the agreement. Reinstatement cannot be applied as relief if the job has been abolished. The complaint which had other charges, became incidental to the main relief of damages. It is held: "Of course, that if the veteran (Grimes) sought only damages, his action would be purely legal in character, with attendant right to jury trial." (IB Moore's Federal Practice 38.24 (2) 2d Ed. 1951). "That the complaint as an initial step is to seek affirmation of the award." (Conn-Zarchen v. Union Equipment Co., 121 A.2d 287, 20



Conn Sup. 44). "As in other law actions, the parties in an action on an award are ordinarily entitled to a jury trial (Minn-Lampert Bros Lumber Co. v. Jake Lampert Yards, 224 NW 248, 176 Minn. 622) "and to have issues of fact properly raised by the pleadings and the evidence determined by the jury." (US Chickasha Cotton Oil Co. v. Chapman, C.C.A. Tex., 4 F.2d 319, cert denied 45 S. Ct. 636, 268 U.S. 700 69 L.Ed. 1164) "under proper instructions from the court." (Minn-Lampert Bros. Lumber Co. v. Jake Lampert Yards, 224 NW 248, 176 Minn. 622.)

Grimes in his complaint demanded a jury trial. (R.206) Following a period of discovery the defendants, L & N Railroad and International Brotherhood of Electrical Workers Local 1353, entered motion to strike the jury demand. (R.207 ) Thereafter on May 6, 1982,



Magistrate Endsley entered order on a pretrial held April 5, 1982. The Court stated: (R.207,208)

New representation for Grimes sought an extension of time on June 16, 1982, and on June 25, 1982, responded to both defendants' motions to strike jury demands by restating demand for jury trial mode.

On July 9, 1982, the District Court held a trial in a non-jury trial mode. The Court raised the question of a jury trial and stated: ( R. 211,212 )

What is important, is that (a) the motion to strike jury demand argument came from one of the defendant attorneys; (b) the motion came from the attorney (Mr. Wolly) for the IBEW; (c) the motion to strike jury demand was in reference to a Title VII claim that was independant and incidental to the damages sought; (d) the claim as to Title VII, as it pertains



to the IBEW had been disposed of earlier by agreement on May 6, 1982; (e) there was no motion to strike jury demand put forth by the L & N; and (f) the last jury demand made was by plaintiff's attorney June 25, 1982. (R.208)

Pursuant to FRCP 79(a) "the substance of each order or judgment of the court"... is put into docket sheets. Pursuant to Indiana Statutes:

"Where transcript was certified by Clerk of Circuit Court, the certificate imparted absolute verity." (State ex rel Busick et al v. Ewing, 102 NE 2d 370)

Docket sheet entries are proof and acceptable evidence.

Following the hearing on July 9, 1982, the District Court made the following entry on the docket sheet:

"Deft's enter motion to strike jury claim court to rule on these matters." (R.208,209)

Only one defendant argued a point as to a jury demand. The point argued was a





nullity, because Magistrate Endsley on May 6, 1982, had disposed of the claim from an agreement between the plaintiff and the IBEW. (R.207,208) There was no jury demand made at the July 9, 1982 hearing, and the District Court's entry is in error. (R.211,212) The District Court's rule on these matters was indeed the final District Court Judgment of February 10, 1984. The last jury demand was made by Grimes on June 25, 1982. The aforementioned is how the District Court acquired its defective equity jurisdiction.

The ruling on the seniority rights impairment issue in the February 10, 1984 judgment was stated in a memorandum opinion and distinct from the legal claims ruled on. (R.56,59) It is undisputed that the ruling on the seniority rights impairment issue as a ruling in equity was proper. The issue



was incidental to damages as it pertained to mode of trial, but flowed directly from the breach on the award and was determinative of the L & N's liability. (See Steffen v. Farmer's Elevator Service Co., 109 F. Supp. 16, p. 20.) ( R.98)

The District Court's February 10, 1986 judgment came directly from the July 9, 1982 hearing in a non-jury trial mode. (R.208,209) Note: The absence of a trial.

The District Court order was silent as to damages in the final February 10, 1984 judgment. ( R.91,92)

Following a trial on a retaliation claim, and appeal on the enforcement issue, Grimes filed on June 11, 1987, his motion to confirm. (R.107) On September 15, 1987, the District Court entered its order denying the motion to confirm for damages on grounds of res judicata argued by the defendant in a motion to dismiss, filed July 2, 1987. (R.20,21,154)



The hearing on the motion to confirm was in the non-jury trial mode. (R.18) As shown earlier, the procedure to confirm an award is a legal proceeding.(R. 144sec(3) The District Court extended its defectively acquired equity jurisdiction to Grimes motion to confirm. This deprived Grimes of his rights under the Seventh Amendment of the jury trial mode. The District Court's order denying confirmation of the award ignored the "nature of the cause of action and appropriate remedy as they exist thereunder." (Fitzpatrick v. Sun Life Assur Co. of Canada, 1 FRD 713.) "If the cause of action is legal in its nature and formerly remedial in a court of law, the right to trial by jury cannot be denied." (Ibid Fitzpatrick v. Sun Life).

In the appellant's motion to confirm, it was argued, "Except as otherwise provided, an application to the



court under this chapter shall be by motion and shall be heard in the manner and upon the notice provided by law," (R.145) and it was also argued, "However, the last sentence in Rule 34 represents, based on standards of the National Railroad Adjustment Board, a total plain adequate and complete remedy. To address the wrongs here, the Appellant (Grimes) made other argument in defense of the right to confirm the award. Silence on damages caused no distinction between law and equity. (R.91,92) In the February 10, 1984 Final Judgment, the District Court separated the equity ruling of seniority right impairment by putting it in a memorandum, opinion attached to the legal decision. (R.56 ) A distinction existed. But, on the order dismissing the motion of September 15, 1987, there is no distinction by words or separate documents. (R.18-25) Through silence and





the absence of any distinction, the District Court was in violation of Art. III § 2 of the Constitution. (R.105,106)

The Court of Appeals did not address the issue of equity jurisdiction in its orders. The Appellant's argument was an argument against equity interference in his main brief. The argument was established in the questions and presented throughout the entire brief. (R.2-11) In spite of the Appellant's arguments, the Court of Appeals omitted any judgment on equity, (R.162) a controlling issue of this case. (United States v. Ballard, (1944) 322 US 78, 88 L.Ed 1148, 64 S. Ct. 882 )

The error the District Court made on the jury demand issue made its decision in equity on the motion to confirm decisions of September 15, 1987, more defective. The Court of Appeals affirmed the District Court's decision without



including the issue of equity in its judgment.

It has been held that: "If a plain defect of jurisdiction appears at the hearing or on appeal, a court of equity will not make a decree," (See Tyler v. Savage, 1891, 79 Supre Court 99, 143 US 83), meaning that although this is a proceeding on appeal, the objection can be raised and that the District Court erred as to damages when it entered a judgment in equity after the defect, even though the defect grew out of a general argument already raised in District Court and on appeal.

Also, a decision in equity is incompatible with res judicata. It has been held: "An action to procure equitable relief cannot be maintained when the relief sought has already been awarded by judgment in another action between the same parties." (Porous



Plaster Co. v. Sea Jury, 43 Huni, 611) as used in Tyler v. Savage. The L & N sought equity relief by raising a motion to strike the jury demand. (R.207)

Accordingly the relief sought included the NRAB decision by operative facts. When the NRAB decision was a previous judgment that is a bar. (Tyler v. Savage) Moreover, "where the remedy at law is adequate, no ground exists for the interposition of equity." (Oakville Co. v. Double Pointed Tack Co., 7 Cent Rep. 720, 105 NY 658, Quinn's App. (Pa) 10 Cent Rep.) 350, Travis v. Lowry (Pa) 7 Cent. Rep 553; New-man v. Westcott, 29 Fed. Rep 49.) (R.140)

Further, this case is one in damages, "a one question of damages is not within the jurisdictions of equity." (Osborne v. O'Reilly, 8 Cent Rep, 551, 42 N.J. Eq. 467. The Appeals Court affirmed a District Court decision that was



dismissed on res judicata. It is held:

"Neither a court of law nor equity will interfere to set aside an award, unless corruption, partiality, misconduct, or irregularity is distinctly proved against the Arbitrator; mere suspicion is not sufficient. (Mosely v. Simpson, 42 L. J. Ch. 730; 16 L. R. Eq. 226; 21 W. R. 694; 28 L.T.N.S. 727; Atkinson v. Townley, 1 N.J. Law 388, Hardeman v. Burge, 10 yerg 202; Ham lton v. Wort, 3 Black F 68; Callant v. Downey, 2 N. J. Marsh 346.)

Res judicata is not one of the reasons for dismissal of an award. The Court of Appeals should not have affirmed the District Court's decision.

#### CONCLUSION

The Court of Appeals erred when it affirmed the District Court's judgment on grounds of res judicata. The doctrine as applied to the operative facts were unrelated and controlled by a different





time frame. The Court of Appeals also erred in omitting the controlling question of equity for equity relief cannot be had when the relief sought has already been awarded by a judgment in another action between the two parties. Nor does equity support damages. The Appeals Court affirmed a judgment that was jurisdictionally defective. The District Court had acquired it's equity interference on an error. This error denied the Appellant his rights by jury trial in violation of the Seventh Amendment and in its silence made no distinction between equity and law in violation of Article III § 2 of the Constitution in affirming a District Court's decision. Appellant, motions to this court to affirm the award, 2956, Docket 7776. The Court of Appeals has in the above sanctioned a departure from judicial proceedings by a lower



court.

For the above reasons this petition should issue.

PRAYER FOR RELIEF

Wherefore the Petitioner prays:

(A) This Court will grant certiorari.

(B) Reinstate the action on the award with instruction.

(C) Void the Appeals and District Court decision for being jurisdictionally defective.

(D) Confirm the award for judgment in damages from the complaint, as calculable, already in stipulation by the parties and only in need of amendment by Petitioner accepting motion herein on Award No. 7956, Docket No. 7776.

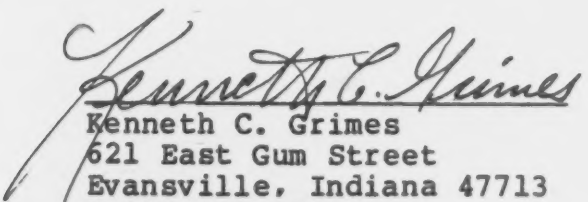
(E) Or in the alternative, void the Appeals and District Court decisions, reinstate and confirm the award, and remand to the Court of Appeals for



judgment on damages as set out in the appeals brief as amended.

(F) That this court not remand to the District Court herein on the grounds that it has been prejudiced by the proceedings.

(G) Void any sanctions in these appeals.

  
Kenneth C. Grimes

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Counsel as Pro Se.



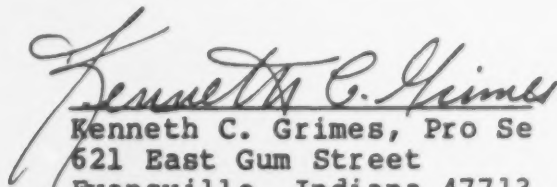
CERTIFICATE OF MAILING

The undersigned, counselor pro se, hereby certifies that he caused to be mailed, postage pre-paid, first class, or personally served, on this 4<sup>th</sup> day of December, 1989, the following copies of this Petition for Certiorari:

Forty (40) copies to  
Clerk, United States Supreme Court  
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Three (3) copies to  
Attorney Galen J. White, Jr.  
Boehl, Stophar, Graves & Deindoerfer  
United Kentucky Bank Bldg.  
One Riverfront Plaza  
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Three (3) copies to  
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Bowers, Harrison, Kent & Miller  
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